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IN THE

Supreme Court of the United States

October Term 1977

NO. 77-1732

Betty Agnew

Petitioner

v.

North Carolina ~~United States of America~~

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Robinson O. Everett
William A. Creech
EVERETT, EVERETT, CREECH & CRAVEN
301 First Union Natl. Bank Bldg.,
Durham, N. C. 27701

John A. Wilkinson
James R. Vosburgh
WILKINSON and VOSBURGH
Ward Bldg.
North Market St.
Washington, N. C. 27889

Counsel for Petitioner

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

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No. 77-

BETTY AGNEW,
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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

This petition for a writ of certiorari seeks review of a decision of the Supreme Court of North Carolina, which affirmed petitioner's conviction on two of the three indictments of which she had been adjudged guilty in the Superior Court of Beaufort County.

OPINIONS BELOW

The Supreme Court of North Carolina rendered its decision on March 7, 1978, and, with Justice Exum dissenting, affirmed petitioner's conviction and sentence on charges of embezzlement and misapplication of public funds, 294 N.C. 382, 241 S.E.2d 684. As to a third indictment for obtaining money by false pretenses, the Supreme Court held the evidence to be insufficient. The Supreme Court reversed in part the decision of the Court of Appeals of North Carolina,

which had ruled on July 6, 1977, that the evidence was insufficient as to all three charges. 33 N.C.App. 496, 235 S.E.2d 287. The opinion of the Supreme Court is reproduced in the Appendix to this Petition at A-1; while that of the Court of the Court of Appeals appears at A-22.

JURISDICTION

The decision of the Supreme Court of North Carolina was filed on March 7, 1978, and this petition is timely filed within 90 days thereof. Jurisdiction to review this case is conferred on the Court by 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. By using the "scintilla of evidence" standard in determining sufficiency of the evidence, did the Supreme Court of North Carolina deprive petitioner of her due process right to be acquitted unless proven guilty beyond reasonable doubt?

2. Did the trial court's limitation of cross-examination of a prosecution witness deprive petitioner of her due process right to confrontation?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV - Sec. 1

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Until her conviction on June 3, 1976, petitioner was Director of Social Services for Beaufort County, North Carolina. She was tried on three indictments which concerned use of a special checking account in her Department. They alleged (a) obtaining money by false pretenses in connection with reimbursement of travel expenses; (b) embezzlement of County funds in her case; and (c) misapplication of public funds.

During the trial petitioner contested the sufficiency of the State evidence by means of motions to dismiss for failure "to make out a case". (Record p. 124, Exception 28). The motion was properly renewed at the end of all the evidence but was denied. (Record p. 327, Exception 93). Thereafter petitioner was found guilty on the three indictments; and a

suspended sentence to confinement was imposed. By assignments of error (No. 15, Record p. 358; No. 64, Record p. 365), petitioner properly continued her challenge to the sufficiency of the evidence during her appeal.

The Court of Appeals (See Appendix at A-22) agreed with petitioner that the evidence was insufficient and reversed the convictions on all three indictments. The State petitioned for a writ of certiorari, which was granted. Reversing the Court of Appeals, the Supreme Court concluded that, although the evidence had been insufficient as to false pretenses, it was sufficient to sustain conviction on the two remaining indictments. In so doing, the majority relied on the "scintilla of evidence" standard and stated, "Nonetheless, if more than a scintilla of evidence is presented to support the indictment, the case must be submitted to the jury." (A-5).

Justice Exum, who relied instead on the "substantial evidence" standard, voted to affirm the Court of Appeals and reverse the conviction as to all charges. The North Carolina Rules of Appellate Procedure, Rule 31, make no provision for a petition for reheading in a criminal proceeding, and so no such petition was submitted.

Among the State's witnesses at the trial was an accountant, who by his audit had revealed financial irregularities in the Beaufort County Department of Social Services. In response to cross-examination about the clients represented by his accounting firm, this witness claimed a privilege not to disclose his clients.

(Record p. 40). Petitioner was seeking to show that among this witness' clients was the newspaper published by petitioner's chief critic and political foe. However, the trial judge sustained the claim of privilege and did not require an answer from the accountant. Petitioner duly excepted to this action of the trial court (Exceptions 7, 8, and 9, Record pp. 40-41) and assigned the court's ruling as error. (Assignment of Error 7, Record p. 357). The Court of Appeals did not reach the issue since it reversed for insufficiency of the evidence as to all three indictments. The Supreme Court concluded that the trial judge had erred since no privilege existed on the part of the witness to keep secret his clients. However, it did not consider the error prejudicial. (App. pp. A-16 to A-17).

REASONS WHY THE COURT SHOULD GRANT THE WRIT

1. Use of the Scintilla of Evidence Rule by the North Carolina Supreme Court and Other Appellate Courts Violates a Defendant's Due Process Right to be Proven Guilty Beyond Reasonable Doubt.

The opinion of the majority in the North Carolina Supreme Court utilized the scintilla of evidence rule and concluded that the State had adequately established petitioner's guilt of two charges. Justice Exum, in dissent, and the Court of Appeals used the "substantial evidence" rule and concluded that the evidence was insufficient to establish guilt on any charge. Obviously, the choice of the standard of review for sufficiency does make a difference -- a difference between affirmance and non-affirmance, between conviction and acquittal. To the extent the scintilla of evidence standard is applied

in future cases in North Carolina and other jurisdictions, it may be decisive again.

This Court has ruled that it violates the Due Process Clause of the Fourteenth Amendment for a State court to convict a defendant without evidentiary support. Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L. Ed.2d 654(1960). Moreover, it has held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368, 375(1970). Accord: Ivan v. New York, 407 U.S. 203, 92 S.Ct. 1951(1972)(giving retroactive effect to Winship). A rule of law placing the burden of proof on the defendant as to a fact necessary to constitute the crime charged deprives a defendant of due process since it relieves the State of its constitutional obligation to prove his guilt beyond reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881 (1975); Hankerson v. North Carolina, 432 U.S. 233, 97 St. Ct. 2319, 53 L.Ed.2d 306 (1977). Ct. Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943); Leary v. United States, 395 U.S.6, 89 S. Ct. 1532, 23 L.Ed.2d 57(1969).

Similarly, reliance by a trial or appellate court on the scintilla of evidence standard in determining sufficiency of the evidence flies in the face of a defendant's right to have his guilt established beyond reasonable doubt. As demonstrated in petitioner's case, the "scintilla of evidence" standard can yield a quite different result than the standard of "substantial evidence". Since not only the North Car-

olina courts but also other courts utilize the scintilla test, the question presented is of general significance. Accordingly, the petition for certiorari should be granted in this case so that this Court can make clear that the scintilla of evidence standard does not comply with the due process requirement of proof beyond reasonable doubt.

2. Although the Trial Court's Restrictions on Cross-Examination Violated Petitioner's Right of Confrontation, the North Carolina Courts Condoned the Violation of This Due Process Right. Cross-examination is an important component of the right of confrontation, safeguarded by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923(1965). Petitioner was denied this right as to one of the State's witnesses by virtue of the trial court's ruling that, as an accountant, he had a privilege not to reveal who were his clients. The North Carolina Supreme Court, while acknowledging the trial judge's error, held that it was not prejudicial. However, the standard of prejudicial error, as applied here by the North Carolina Supreme Court, is not the proper test for measuring the effects of violation of a federal constitutional right. Instead the absence of harm to the petitioner should have been established beyond reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed.2d 705(1967). It is important for this Court to grant the writ of certiorari and reaffirm the principle that absence of prejudice from violation of a defendant's federal constitutional rights must be demonstrated beyond reasonable doubt if his conviction is to be affirmed.

CONCLUSION

In reversing the decision of the Court of Appeals and reinstating petitioner's conviction on two charges, the North Carolina Supreme Court violated her Fourteenth Amendment Due Process rights to be proven guilty beyond reasonable doubt and to confront the witnesses against her. The Court's opinion has implications beyond the present case. By applying the scintilla of evidence test of sufficiency, it allows convictions to be obtained without the constitutionally required evidentiary support. By failing to require that a federal constitutional error be shown beyond reasonable doubt to have been harmless, the Court authorizes an erosion of those rights under the guise of "harmless error". Thus, vindication of the constitutional rights not only of petitioner here but of many other defendants requires the grant of the writ of certiorari.

Respectfully submitted,

Robinson O. Everett
Counsel of Record

William A. Creech

John A. Wilkinson

James R. Vosburgh

Attorneys for Petitioner
Agnew

June 5, 1978

CERTIFICATE OF SERVICE

I certify that, pursuant to Supreme Court Rule 33, I have served the foregoing Petition for a Writ of Certiorari to the North Carolina Supreme Court by mailing three copies, first class postage prepaid, to the Honorable Rufus L. Edmisten, Attorney General of North Carolina, Department of Justice, P.O. Box 629, Raleigh, N.C. 27602.

This 5th day of June 1978.

Robinson O. Everett
301 FUNB Building
Durham, North Carolina
27701
(919) 682-5691

Counsel of Record for
Petitioner Agnew

APPENDIX TO PETITION

SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1978
NO. 75 - BEAUFORT

State of North Carolina,

versus

Betty Agnew,

Defendant, on indictments proper in form, was charged with and convicted of obtaining property by false pretense, embezzlement and willful misapplication of funds. We granted the State's petition for discretionary review of the decision of the Court of Appeals, 33 N.C. App. 496, 236 S.E. 2d 287 (1977), (Martin, J., concurred in by Britt and Parker, JJ.), reversing the judgment of Cowper, J., May 1976 Criminal Session Beaufort County Superior Court, for failure to grant defendant's motions for nonsuit. This case was docketed and argued during Fall Term 1977 as No. 98.

Defendant here was director of the Beaufort County Department of Social Services. The crimes charged by these indictments concern alleged irregularities surrounding a checking account maintained by this Department.

The State's evidence tended to show the following:

Defendant had sole control of this checking account which contained funds received from the North Carolina Blind Commission for use in administering the Department's aid to the blind program, money earned by work release prisoners for distribution to their families, funds received from other counties for care of foster children being housed in Beaufort County, donations, court ordered support payments, and refunds from welfare clients who had been overpaid by the county. The so-called "blind money" was received by the Department of Social Services through 1971, but thereafter, pursuant to an opinion issued by the Attorney General of North Carolina, these funds were delivered to the county to be deposited directly into the county treasury.

On 15 July 1975 the Department of Social Services received a letter from the Board of County Commissioners stating that the county had contracted for an audit of all its departments for the fiscal year ending 30 June 1975. This audit subsequently revealed that as of 18 August 1975 defendant had received $1,314.75 in advances from the checking account, repayment of which could not be independently traced through cash receipt books or bank deposit slips. It further appeared that $430.75 had been drawn from the account to cover the costs of a business trip to Boston made by defendant in October of 1974 to attend a conference on child abuse. Defendant filed for reimbursement from the county for the costs of this trip and on 28 February 1975 she was issued

a check which included $434.63 for these expenses.

It was also disclosed that defendant had expended $1,128.94 from the account for items such as food for staff parties, two coffee pots for the office, magazine subscriptions, gifts and flowers for county commissioners and other officials and advances to Department employees for vacation and living expenses.

After receiving notice of the impending audit, on 20 July 1975 defendant called one of her employees, Sue Modlin, into her office and handed her $900.00 in cash, saying it represented repayment of defendant's advances. Defendant then directed her to find some client refunds to be repaid to the county accountant's office for that amount of money and use the cash to pay them, which was done.

Defendant's evidence tended to show that:

This account was already in existence in 1968 when defendant became director of the Department. She maintained that the blind money was discretionary and could be used for any purpose in the administration of the Department of Social Services. Other than the blind money and donations for various specific functions, this account was used as a pass-through account to channel the work release, foster care, support, and client refund

moneys delivered to the Department to the proper recipients. The discretionary funds were used to pay office expenses and make advances to Department employees when their travel expense reimbursement checks were delayed. Defendant testified that the Board of Social Services was aware of and approved the practice of making travel advances. Defendant further stated that advances from the checking account were often repaid in cash and used for other Department expenditures without being repaid into the account.

Additional facts relevant to the decision are related in the opinion.

Attorney General RUFUS L. EDMISTEN, by Assistant Attorney General WILLIAM F. BRILEY for the State.

WILKINSON AND VOSBURGH, by JOHN A. WILKINSON for defendant-appellee.

COPELAND, Justice.

After careful consideration of the evidence in this case, we have determined that defendant's motion for judgment of nonsuit as to the charge of obtaining property by false pretense should have been allowed; however, the trial court's denial of the motions for nonsuit of the charges of embezzlement and willful misapplication of funds was proper. We have examined defendant's assignments of error concerning the conduct of the trial and found them to be without merit. The decision of the Court of Appeals, consequently, is

affirmed in part and reversed in part.

In ruling on a motion for judgment of nonsuit, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. State v. Bell, 285 N.C. 746, 208 S.E. 2d 506 (1974). The court in considering such a motion is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. State v. McNeil, 280 N.C. 159, 185 S.E. 2d 156 (1971). Moreover, all evidence admitted during the trial, whether competent or incompetent, which is favorable to the State must be taken as true, State v. Roseman, 279 N.C. 573, 164 S.E. 2d 289 (1971), and any contradictions or discrepanies therein must be resolved in the State's favor. State v. Evans, 279 N.C. 447, 183 S.E. 2d 540 (1971). Defendant's evidence which tends to rebut the inference of guilt may be considered when it is not inconsistent with the State's evidence. State v. Blizzard, 280 N.C. 11, 184 S.E. 2d 851 (1971). Nonetheless, if more than a scintilla of evidence is presented to support the indictment, the case must be submitted to the jury. State v. Kelly, 243 N.C. 177, 90 S.E. 2d 241 (1955).

A motion for nonsuit of a charge of obtaining property by false pretense must be denied if there is evidence which, if believed, would establish or from which the jury could reasonably infer that the defendant (1) obtained

value from another without compensation, (2) by a false representation of a subsisting fact, (3) which was calculated and intended to deceive and (4) did in fact deceive. State v. Davenport, 227 N.C. 475, 42 S.E. 2d 686 (1947). We note that G.S. 14-100, which defines this crime, was amended subsequent to the date of the acts charged here so that false representations of future fulfillments or events are now also prohibited.

The State's theory, as pointed out by the Court of Appeals, appears to be that defendant falsely represented to the county that she had expended her personal funds for the costs of the Boston trip and was entitled to reimbursement, when in fact she had used funds advanced from the Department of Social Services account to cover these expenses and thus was seeking to recover the same money twice. An examination of all the evidence presented rebuts this, however, since it was uncontradicted that the Department checking account was not responsible for travel expenses, but was used only for occasional advances which were to be repaid when the individual employee received his or her reimbursement check from the county. The representation by defendant that she was entitled to reimbursement of the funds spent on the Boston trip, therefore, was not false at the time it was made and this essential element of the crime is not supported by any evidence in the record.

The State further argues that, because defendant had shared a hotel room with two other women attending the conference and had received cash from them in payment of their portion of its cost, she had actually claimed for a double recovery when she filed her expense report. This too is not supported by the evidence, since an examination of the expense statement submitted by defendant to the county discloses that only one-third of the total cost of the room was included in her claim for reimbursement.

The evidence also showed that defendant, after receiving notice of the impending audit, obtained back-dated checks from the women who shared the room with her in Boston and that the reimbursement received by defendant from the county was not deposited back into the Department checking account until over two months after she was notified of the audit. This could support a reasonable inference that when defendant filed for reimbursement she never intended to return the money to the Department account and thus by implication falsely represented the use to which the funds would be put when they were received. Such a representation, however, would pertain to a future fulfillment or event, rather than a past or subsisting fact. The amendment to G.S. 14-100 which added false representations of future events to the statutory prohibition became effective 1 October 1975, some seven months after the reimbursement check was issued by

the county; therefore, the representation by defendant here was not a violation of the false pretenses statute at the time it was made, since prior to the enactment of this amendment promises of future action could not be the basis of a prosecution under this statute. State v. Hargett, 259 N.C. 496, 130 S.E. 2d 865 (1963). Consequently, it is our conclusion that defendant's motion for judgment of nonsuit as to the charge of obtaining property by false pretenses should have been granted.

The State next contends that there was sufficient evidence to go to the jury on the charge of embezzlement. The crime of embezzlement was unknown to the common law and is defined solely by statute. State v. Ross, 272 N.C. 67, 157 S.E. 2d 712 (1967). Under G.S. 14-90, "If any person exercising a public trust or holding a public office, or any . . . trustee . . . or any other fiduciary . . . or any agent, . . . except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or . . . check . . . belonging to any other person . . . or organization which shall have come into his possession or under his care . . ." he shall be guilty of the felony of embezzlement.

In the instant case, the State's evidence tended to show that: Defendant

had received some $1,314.74 in advances from the Department checking account, repayment of which, as of the date of the audit, could not be traced by cash receipts or bank deposit slips. Five days after the Department was notifed of the audit, defendant gave $900.00 in cash to one of her employees and told her that it represented repayment of defendant's advances. When the auditors first requested to see all the cash on the premises, defendant had $314.05 on hand. Upon being informed by the auditors that they were unable to account for approximately $100.00, defendant subsequently showed them cash in the amount of $100.00, telling them it had initially been overlooked. The reimbursement for the Boston trip received by defendant from the county was not deposited back into the Department checking account until seven months after the date of the check to defendant and over two months after defendant received notice of the impending audit. When the auditors first examined the Department's checking account records, they discovered a $180.75 disbursement from the account for which no corresponding check could be found. Check number 459 could not be found in the bank statements and its stub in the check book had been marked "Void." Defendant later found check number 459, which was made out to Statler-Hilton in the amount of $180.75, and presented it to the auditors, telling them it was used to pay the hotel bill for the Boston conference. At this time, neither the two back-dated checks from defendant's companions on the trip nor defendant's check for her share of

the hotel bill had been deposited back into the Department account. At some point during the course of the audit, the control card on which defendant recorded her personal advances from the account was altered by the addition of an extra column, apparently for approvals, in which appeared the initials of the chairman of the Board of County Commissioners.

The Court of Appeals held that there could have been no fraudulent conversion here because the allegedly missing funds were on hand for disbursement at the proper time. It is no defense to a prosecution for embezzlement, however, that the defendant intended to return the property obtained or was able and willing to do so at a later date. State v. Howard, 222 N.C. 291, 22 S.E. 2d 917 (1942), State v. Summers, 141 N. C. 841, 53 S.E. 856 (1906). Moreover, the element of fraudulent intent necessary to sustain an embezzlement conviction may be established by evidence of facts and circumstances from which it reasonably may be inferred, as well as by direct evidence. State v. McLean, 209 N.C. 38, 182 S.E. 700 (1935).

Defendant sought to show at trial that she had repeatedly requested bookkeeping help in her Department from the Board of County Commissioners. Yet, defendant testified that the number of budgeted positions in the county Department of Social Services had increased from 19 at the time she became director in 1968 to 62 at the time of trial. While the lack of a competent bookkeeper

might arguably tend to negative fraudulent intent, this would be rebutted by the inference that someone competent to handle the ten to fifteen minutes' work per week this account required could have been found among these additional employees.

Considering the evidence set out above in the light most favorable to the State, we conclude that the jury reasonably could have found from the timing of the payments of the various amounts by defendant that she had converted the funds to her own use and, when the danger of discovery became imminent, sought to return the money to conceal her wrongdoing. Further, the procurement of the back-dated checks, together with discrepancies in the amount of cash on hand and irregularities in the check book records, would tend to show guilty knowledge on the part of defendant and allow the jury to infer that the funds had been converted or misapplied with a fraudulent intent. We hold, therefore, that the motion for nonsuit on the charge of embezzlement was properly denied by the trial court.

Defendant was also charged, under G.S. 14-92, with willfully and corruptly using and misapplying $1,128.94 for purposes other than those for which it was held. It is her contention that the motion for nonsuit of this indictment should have been granted because the State failed to show that the moneys which she allegedly misapplied were funds belonging to or held in trust for the county. It was further held by the

Court of Appeals that the State offered no proof that the alleged misapplication was willful or corrupt.

Defendant argues that the blind funds in the Department checking account were not county money because through 1971 they had been delivered to the county Department of Social Services, rather than the county treasury. The State's evidence shows that this money consisted of federal funds distributed by the North Carolina State Commission for the Blind to help defray the costs of administering the aid to the blind programs in the county. The practice of disbursing this money to the county Department of Social Services office rather than to the county treasury was based on a 1948 opinion of the Attorney General of North Carolina. In 1971, however, the Attorney General issued an opinion, 41 Op. Att. Gen. 329 (1971), which concluded that these funds should be made payable to the county treasuries and not to the county Boards or Departments of Social Services. It is defendant's position that all such funds received prior to this change in procedure were not moneys belonging to or held in trust for the county and, therefore, they could not be the subject of an indictment under G.S. 14-92.

An Opinion of the Attorney General, however, is merely advisory. In re Assessment of Additional Taxes against Virginia-Carolina Chemical Corporation, 248 N.C. 531, 103 S.E. 2d 823 (1958). If, under the law, the funds were properly owed to the county, the payment to the Department of Social Services would

be in trust for the county, presumably to be used by the Department for administration of the aid to the blind program. Since the 1971 Attorney General's opinion appears to be correct in finding that the funds were earned on county time by county employees and therefore were moneys "belonging to the county" under G.S. 155-7, and further because defendant does not assert that this finding was erroneous, we adopt its conclusion as our own. Thus we find that the federal aid to the blind administrative funds were indeed moneys owed to the county treasury and were to be held in trust for the county upon their receipt by the county Department of Social Services.

We next consider the determination of the Court of Appeals that the State here failed to show any willful or corrupt misapplication of these county funds. Since the State need not prove embezzlement or misapplication of the entire sum alleged in the indictment, State v. Ward, 222 N.C. 316, 22 S.E. 2d 922 (1942), we need review only one segment of the State's evidence to establish the requisite elements of the crime charged. There was testimony tending to show that one of the Department employees, Sue Modlin, was advanced funds by defendant from the Department checking account on two specific occasions for purposes which were entirely unrelated to her employment. The first of these advances was in the amount of $75.00 and was used by Mrs. Modlin to pay her rent. The second was for $100.00, which was used for vacation

expenses. Defendant testified that all such advances came from the blind money and that she regarded the uses to which these funds were put as entirely within her discretion. Defendant further stated that she did not ask Mrs. Modlin what she wanted the advances for, but gave them to her merely because she requested them.

The words "willfully" and "corruption", as they relate to misapplication of funds under G.S. 14-92, have been defined as "[D]one with an unlawful intent," and "The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others." State v. Shipman, 202 N.C. 518, 540, 163 S.E. 657, 669 (1932). Although these advances appear to have been repaid to the account, it is clear that their disbursement for such purely personal uses had nothing to do with defraying the administrative expenses of the aid to the blind program in Beaufort County. Such blatant misapplication of these funds, coupled with defendant's apparent reckless disregard for the purposes for which they were to be used, lead us to conclude that the jury could reasonably have inferred the necessary elements of willfulness and corruption from the facts presented.

Typical of the items purchased from this account under alleged misapplications were a gift for a State Department of Social Services official,

pumpkin pies for the county Department of Social Services staff at Thanksgiving, $50.00 worth of Christmas decorations for the office, and food for the staff Christmas party.

Defendant has also attempted to show that many of these items were approved by the county Board of Social Services and thus were not misapplications of Department funds. The fact that a supervisory board has knowledge of a subordinate's unlawful use of public moneys, however, does not excuse or justify one who knowingly misapplies such funds unlawfully. State v. Linden, 171 Wash. 92, 17 P. 2d 635 (1932); Glasheen v. State, 188 Wis. 268, 205 N.W. 820 (1925). For the reasons set out above, defendant's contention that this charge should have been dismissed is without merit.

Defendant assigns many errors concerning the admission and exclusion of evidence by the trial court. Chief among these was the admission at the conclusion of the State's case of checks, check stubs, audit reports, working papers, client refund receipts, ledgers and other documents. Defendant argues that many of these exhibits contained irrelevant and incompetent material and that they were not properly authenticated.

We have carefully examined these documents, however, and find nothing substantially prejudicial among the allegedly irrelevant portions thereof. Moreover, a review of the record

discloses that each of the challenged exhibits had been authenticated before its introduction. The majority of these documents were obtained from defendant by Claude Green, an investigator with the North Carolina Department of Justice, and consisted of records kept in the county Department of Social Services office under defendant's supervision. Entries in corporate books or records are admissible in evidence against the officers of the corporation in a criminal prosecution if there is evidence tending to show that some actual connection exists between the officers and the contents other than their mere status as corporate officers. State v. Franks, 262 N.C. 94, 136 S.E. 2d 623 (1964). This principle, logically extended to the case sub judice, clearly supports the admission of the documents Mr. Green obtained from defendant, since the county Department's books were maintained under the direction of defendant and the checking account records were controlled solely by her.

The remainder of the exhibits were properly identified by persons who either prepared them or received them from defendant and turned them over to Mr. Green. Defendant's assignment of error regarding the admission of the State's documentary evidence, therefore, is overruled.

During the cross-examination of the accountant who conducted the county audit, the trial court sustained objections to questions concerning whether the witness was an officer of the Washington

Daily News Corporation and whether his firm did the accounting work for the Washington Daily News. Counsel for defendant then sought to have the answers to these questions placed in the record, at which time the witness asserted an accountant-client privilege. The court, on the basis of this claim, refused to order the witness to answer for the record. Defendant argues that this was an undue restriction of cross-examination and was seriously prejudicial.

We agree that the court's refusal to require the witness to answer for the record was error, since North Carolina recognizes no accountant-client privilege. 1 Stansbury's N.C. Evidence, (Brandis Rev. 1973), §54, p. 160. Nonetheless, even if the witness had answered these questions, nothing material would have been shown. Defendant maintains that she would have been able to demonstrate the relevance of this evidence if she had been allowed to proceed. We note, however, that the court did not prohibit this entire line of questioning. Counsel for defendant merely failed to pursue it further after he was initially rebuffed. Under these circumstances, we cannot speculate as to what questions defendant might have propounded to this witness. Since defendant has failed to demonstrate prejudice, this assignment of error is without merit.

New trial will not be awarded absent a showing of error so substantial that a different result likely would have ensued. State v. Cross, 284 N.C. 174,

200 S.E. 2d 27 (1973). We have carefully reviewed defendant's remaining assignments of error concerning the trial court's evidentiary rulings and found none so prejudicial as to warrant new trial; therefore, they are overruled.

Defendant next contends that the trial judge, by various comments in the presence of the jury, impermissibly expressed an opinion prejudicial to her in violation of G.S. 1-180. It is the duty of the trial court to supervise and control the course of the trial, including the examination and cross-examination of witnesses, so as to insure justice for all parties. State v. Greene, 285 N.C. 482, 206 S.E. 2d 229 (1974). After examining the statements challenged by defendant as violative of G.S. 1-180, we conclude that they were reasonable efforts on the part of the trial judge to maintain progress and proper decorum in what was evidently a prolonged and tedious trial. This assignment is likewise without merit and overruled.

Defendant's final group of assignments concerns the trial court's charge to the jury. She contends that the trial judge erred in failing to give certain specific instruction requested by her. She further argues that the court did not adequately review the evidence or relate the law to the facts. The requested instructions were submitted to the court shortly before it was to charge the jury, at which time the judge stated that he would not read them to the jury because they had been tendered too late. This was not a proper basis upon which

to reject the instructions, since G.S. 1-181 requires only that written requests for special instructions be submitted before the judge begins his charge.

A defendant is not entitled to have his requested instructions given verbatim, so long as they are given in substance. State v. Howard, 274 N.C. 186, 162 S.E. 2d 495 (1968). Moreover, the court may totally refuse instructions based on an erroneous statement of the law, State v. Smith, 237 N.C. 1, 74 S.E. 2d 291 (1953), or which concern issues irrelevant to the case. State v. Smith, 202 N.C. 581, 163 S.E. 554 (1932). We find in reviewing the record that in substance the court's instructions stated all the relevant and legally correct propositions requested by defendant. In addition, the court's review of the evidence, while concise, was accurate and sufficient to permit the jury to comprehend the issues they were to decide. This group of assignments, consequently, is overruled.

In summary, we have determined that there was insufficient evidence to go to the jury on the charge of obtaining property by false pretenses; however, the motions for nonsuit of the charges of embezzlement and willful misapplication of funds were properly denied. Further, the remaining assignments of error here reveal nothing of sufficient prejudice to merit a new trial. The decision of the Court of Appeals holding that the charge of obtaining property by false pretense should have been dismissed is affirmed. The holding that the embezzle-

ment and willful misapplication of funds charges should have been dismissed is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

EXUM, Justice, dissenting:

While there may be statements in earlier cases that "more than a scintilla of evidence" is enough in a criminal case to survive a motion for nonsuit, see State v. Kelly, 243 N.C. 177, 90 S.E. 2d 241 (1955), relied on by the majority for this test, our more recent cases have correctly stated that the true test is whether there is "substantial evidence--direct, circumstantial, or both--to support a finding that the offense charged has been committed and that the accused committed it." State v. Stewart, 292 N.C. 219, 224, 232 S.E. 2d 443, 447 (1977), accord, State v. White, 293 N.C. 91, 235 S.E. 2d 55 (1977), State v. Smith, 291 N.C. 505, 231 S.E. 2d 663 (1976); State v. Cousin, 291 N.C. 413, 230 S.E. 2d 518 (1976), compare the citations supporting the "More than scintilla" test with those supporting the "substantial evidence test" in Strong's N.C. Index 3d, Criminal Law § 106, p. 548, nn. 61-63. In its consideration of this case the Court of Appeals correctly applied the substantial evidence test, relying on our decision in State v. Evans, 279 N.C. 447, 453, 193 S.E. 2d 540, 544 (1971).

Applying the substantial evidence test here, which I believe to be the proper one, I feel defendant's motions for nonsuit as to all charges should have been allowed. There is substantial evidence here of inadequate and perhaps careless bookkeeping in the embezzlement case and poor judgment in the misapplication of funds came by a harried county employee. There is no substantial evidence of criminal or corrupt conduct on her part. I vote to affirm the well-considered decision of the Court of Appeals.

NO. 762SC894

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 1977

State of North Carolina

v.

Betty Agnew

Beaufort County
Nos. 76CR1509
76CR1510
76CR1511

Appeal by defendant from Cowper, Judge. Judgment entered 3 June 1976 in Superior Court, Beaufort County. Heard in the Court of Appeals 7 April 1977.

Defendant was indicted for obtaining $434.63 from Beaufort County and the Beaufort County Department of Social Services by means of false pretenses by representing to them that she had expended her personal funds for a business trip to Boston and was entitled to be reimbursed when in fact she had expended funds from the Beaufort County and the Beaufort County Board of Social Services checking account which funds she failed to repay after obtaining reimbursement from the county. Defendant was also indicted for embezzling $1,300.00 from the county and the Department of Social Services and for misapplying $1,128.94 belonging to the county and the Department of Social Services.

State's evidence tended to show that the Department of Social Services maintained a checking account which was

within the sole control of defendant, director of the Department of Social Services; that the account contained federal and state "blind funds," i.e., money received from the Blind Commission for use as the director saw fit in the administration of the Department of Social Services' aid to the blind program; that the account also contained work release funds (funds earned by prisoners on work release to be distributed to their families), foster care funds (funds from other counties for their foster children being cared for in Beaufort County), donations, support payments (court ordered payments for dependent families) and refunds from clients who had been overpaid by the county; that "blind funds" were received and placed into the account until 1971 after which no more such payments were received; that some time shortly after 11 July 1975 a memo was sent to defendant and the Department of Social Services stating that they were to be audited; that an audit of the account revealed that as of a certain date defendant had outstanding $1,314.64 in "advances" to herself from the account; that of those advances three checks totaling $430.75 had been drawn by defendant on the account to cover the costs of a business trip to Boston in 1974; that defendant also filed a travel voucher with the county auditor for said trip and received $434.63 from him for her alleged expenses on the trip; that the audit also revealed that defendant had expended $1,128.94 from the account for expenses such as food for the staff at staff parties, two coffee pots for the office, gifts and flowers for county commis-

sioners, Department of Social Services' entertainment expenses, magazine subscriptions and dues; that on 20 July 1975, after receiving notice of the audit, defendant gave to one of her employees $900 in cash, telling her it was in repayment of advances made to defendant and instructing the employee to transmit the money to the county auditor which the employee did; and that on 29 September 1975 defendant deposited $414.64 into the account.

Defendant testified that when she became director of the Department of Social Services in 1968 an account containing the "blind funds" was already in existence; that these funds were discretionary and could be used for anything in the administration of the Department of Social Services; that defendant also found money lying around the office from collections for various functions and so, with the Board's approval, defendant consolidated all of the money into one checking account; that also funneled into the checking account were work release funds, foster care funds, donations for specific functions, support payments and client refunds (but these rarely remained in the account, the social worker usually drawing a check on the account immediately after their deposit made payable to the intended recipient and the refunds being paid over to the county auditor); that the account was merely a pass-through account for those funds; that defendant used the remaining funds for office expenses and advances to employees for travel expenses pending their reimbursement by

the county, which often took as much as two months; that the Board was aware of and approved the practice of making travel advances; that 11 advances to employees had been repaid; that defendant repaid part of the advances for the Boston trip by giving $180 in cash to Mr. Randolph, former Chairman of the Board, at a Board meeting; that the $180 represented $114 given to defendant by two women who shared her hotel room in Boston and $66 for defendant's share of the hotel cost; that Mr. Randolph misplaced the money and for that reason only it was not in the account at the time of the audit; that the money was subsequently found but prior to finding it defendant had the two women give her backdated checks in order to have proof that they had shared expenses; that defendant's office expenditures from the account would eventually deplete the discretionary or blind funds entirely since they have ceased coming in, although defendant does not know how much blind money is in the account; that the $900 payment to Mrs. Modlin together with the $414.64 deposit which was made by defendant after the audit commenced consisted of money which was already in the account in that it was cash on hand; that the "account" consisted of the amount in the checking account, the amount of cash on hand and the amount represented by advances; and that advances were often repaid in cash and the cash then used for some other expenditure without being deposited into the checking account. Four present or former Board members and three present or former county commissioners testified

and they corroborated defendant's testimony as to their approval of the office expenditures from the account and their knowledge of defendant's practice of advancing travel funds from the account even though the Commission's policy was for employees to expend their own funds for travel prior to being reimbursed by the county. They further testified that neither the Board nor the county commissioners had adopted a policy governing use of the account but had left it to defendant's discretion; that they did not know exactly what funds were in the account although they knew it contained "blind funds" and referred to the account as defendant's discretionary account; that defendant had asked for bookkeeping help with the account several times; that they knew of the advances and approved them on the basis of their understanding that they would be repaid. Mr. Randolph, a member of the Board from 1969 to 1975 and chairman from 1973 to 1975, testified that he knew the contents of the account and approved defendant's expenditures therefrom while he was chairman and that he knew of no instance where county funds contained in the account did not reach the recipient for whom they were intended. He also corroborated defendant's testimony concerning repayment of her advance for the Boston trip by testifying that at a Board meeting defendant had given him an envelope containing money, although he did not count it, representing payments to her by two ladies who shared her hotel room in Boston and that he subsequently misplaced the envelope.

Defendant was convicted of all three offenses and sentenced to one year for each offense. The sentences were all suspended for two years upon payment of a total of $5,000 in fines and on condition that she not violate any laws. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Patricia H. Wagner, for the State.

Wilkinson & Vosburgh, by John A. Wilkinson, for the defendant.

MARTIN, Judge.

Defendant contends that the trial court committed error when it failed to grant defendant's motions to dismiss in each of the three cases at the conclusion of all the evidence. We agree with defendant and hold that the evidence was insufficient to survive the motions.

Defendant's motions to dismiss, made at the close of all the evidence, draws into question the sufficiency of all the evidence to go to the jury. See State v. Hitt, 25 N.C. App. 216, 212 S.E. 2d 540 (1975).

Our Supreme Court has stated that:

> "There must be substantial evidence of all material elements of the offense charged in order to withstand a motion for judgment of nonsuit. (Citations omitted.) If, considered in accordance with the

above mentioned rule, the evidence is sufficient only to raise a suspicion or conjecture as to whether the offense charged was committed, the motion for nonsuit should be allowed even though the suspicion so aroused by the evidence is strong." (Citations omitted.) State v. Evans and State v. Britton and State v. Hairston, 279 N.C. 447, 453, 183 S.E. 2d 504, 544 (1971).

CHARGE OF FALSE PRETENSE

The crime of false pretense is statutory. G.S. 14-100. The essential elements which the State must prove to the satisfaction of the jury beyond a reasonable doubt in order to convict one of the crime of false pretense are as follows:

"'. . .[A] false representation of a subsisting fact [or of a future fulfillment or event as provided in G.S. 14-100 as amended in 1975], calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another, without compensation. . . .'" State v. Davenport, 227 N.C. 475, 495, 42 S.E. 2d 686, 700 (1947); see also State v. Roberts,

189 N.C. 93, 126 S.E. 161 (1925); State v. Wallace, 25 N.C. App. 360, 213 S.E. 2d 420 (1975); State v. Banks, 24 N.C. App. 604, 211 S.E. 2d 860 (1975).

The indictment for false pretense and the State's theory of the case seem to be that defendant, after having obtained Social Services' funds to fund the Boston trip, collected the same amount from the county treasurer and accountant and failed to reimburse the Department of Social Services for these expenditures until after an audit had begun. It contends that in February 1975 she submitted a claim for reimbursement for travel for $588.78, of which $434.63 was to reimburse her for her trip to Boston; and she did not reimburse the Department of Social Services until 29 September 1975.

Intent is a subjective matter which seldom can be proved by direct evidence but may be inferred from the circumstances existing at the time of the alleged commission of the crime charged. State v. Little, 278 N.C. 484, 180 S.E. 2d 17 (1971). The State's evidence affirmatively shows that the Department of Social Services maintained bank account No. 7-099-050. This account was referred to as the "revolving account," which consisted of funds on deposit and cash on hand. It was used for, among other things, advances to personnel of the Department to defray travel expenses pending their receipt of reimbursement from the county. These repayments were some-

times delayed for several months but were eventually all repaid. On 28 February 1975 the county reimbursed defendant for expenses on the Boston trip.

The indictment charges that:

> ". . .[S]he had not expended her personal funds but funds belonging to Beaufort County and the Beaufort County Board of Social Services maintained in Account Number 7-099-050, and she, the said Betty Agnew, then and there knowing she was not entitled to be reimbursed and upon being reimbursed not placing said reimbursement in Account Number 7-099-050."

The State's evidence shows that the "revolving account" was not altogether money belonging to Beaufort County but came from various sources. The account was in control of the defendant subject only to the approval of the Beaufort County Board of Social Services. Mrs. Agnew made herself an advance from the revolving fund for the Boston trip which was to be paid ultimately by the county and she was responsible for its replacement to the revolving fund. Her request to the county for reimbursement was not to collect twice for the same expenditures but to repay the revolving fund the advance for which repayment she was personally responsible. All the evidence shows that advances from the revolving fund, regardless of

who they were made to, were to be repaid and were repaid by the recipient thereof. The county owed Mrs. Agnew travel money for the Boston trip and Mrs. Agnew owed the revolving account of the Social Services Department for advances for the trip. The revolving account of the Social Services Department was never responsible for travel expenditures. It was used only for advances pending reimbursement by the county. The defendant's request for reimbursement was not a fraudulent representation and the motion for nonsuit at the close of all the evidence should have been allowed.

CHARGE OF EMBEZZLEMENT - G.S. 14-90

G.S. 14-90 makes it a felony to embezzle or to fraudulently or knowingly misapply property received by virtue of office or employment. The meaning of fraudulent intent as used in G.S. 14-90 is the intent to willfully or corruptly use or misapply the property of another for purposes other than that for which it is held. See State v. Howard, 222 N.C. 291, 22 S.E. 2d 917 (1942); State v. McLean, 209 N.C. 38, 182 S.E. 700 (1935).

The bill of indictment charges the embezzlement of $1300.00. In instructing the jury relative to the charge of embezzlement the court stated:

> "He further testified that Mrs. Agnew gave him a card listing all advances made by her by check and number and amount. That the total of these was

> $1,314.64. That this is the charge of the $1,300.00, the reason for the charge of $1,300.00."

The State's evidence shows that defendant gave Mrs. Modlin $900 in cash on 20 July 1975 to be sent to the county auditor in payment of several accounts. Mr. Green testified: "I determined from an examination of the records that $414.64 did get back into the account on September 29, 1975."

Evidence offered by the State tends to show that expense money was customarily procured from the revolving account to defray authorized travel expense of Social Services employees. Vouchers for repayment by the county were submitted to the county accountant's office. Upon payment the funds were repaid to the Social Services revolving account and thereupon retained either in cash or by deposit in account No. 7-099-050.

The revolving account consisted of both funds on deposit and funds on hand. In his report to the Board of County Commissioners, Mr. Gutfeld stated:

> "During our evaluation of internal control, we found that many employees had access to cash receipts and kept them within their control. Management was apparently not aware of the location of all cash funds, and in at least one case did not have access to the cash, due to the fact

that an employee was on vacation."

However, the inadequate control of the funds of itself does not import criminality. The funds were on hand, in the possession of the Department of which the defendant was responsible, and were accounted for. We perceive no inference of guilt because the $900 payment to the county was not deposited in the bank nor is there an inference of guilt of embezzlement because the $414.64 was deposited in the bank after an uncompleted audit had commenced. The $414.64 was available in cash for accounting purposes on 15 August 1975. As long as the funds were on hand in the possession of the defendant for disbursement at the proper time, there can be no fraudulent conversion or appropriation.

Mr. Green testified:

"Mrs. Agnew accounted for the money on the Boston trip except for $180.75 - she accounted for it in the manner I have previously testified, that she had given cash to Mrs. Sue Modlin. She said she gave cash to Mrs. Sue Modlin escept for the $180.75 which was the check to the hotel.

* * *

Mrs. Modlin stated that Mrs. Agnew had given her $900.00 in cash. . . .

* * *

[W]e pinned that date down to about July 20th, I believe.

The total on the tape is $1,314.64. My examination of the records showed only $414.64 was deposited in the account on September 29, 1975. The $900.00 was not deposited into the account.

* * *

Mrs. Modlin said that $900.00 was cash from Mrs. Agnew to be refunded to the account.

* * *

Mrs. Modlin said she did use that money to make refunds to the county accountant.

* * *

The money did not go back into the account. She did take the cash money and pay some refunds to the county accountant's office."

Mr. Gray of the accounting firm of Gutfeld and McRoy, stated:

"The $180.75 was totally accounted for on the following Monday after about a three or four day lag.

* * *

I talked to her about what is on the back of the card. This was the money that she had paid back from her advances and that was returned to Mr. Hodges, the county accountant. It was $900.00.

I don't remember if she told me when the $900.00 was returned to the county accountant but I looked at the date, I looked back and found out when it was returned. I think it was August 1st, I am not positive.

* * *

This money was turned over with some other money to Mr. Hodges and I traced it to what it was turned over but it was $900.00 of this money was turned over at this time but there was some more money turned over to Mr. Hodges at that time."

The audit report of Mr. Gutfeld shows that on 7 August 1975 Mrs. Agnew, Department of Social Services, had $314.05 cash on hand, checks totaling $180.75 (Agnew $66.61) (Bolton $57.07) (Allen $57.07) and on 15 August Mrs. Agnew had $100.00 cash on hand. Mrs. Agnew informed Mr. Gutfeld that the sum of $100.00 was overlooked when original cash counts were made.

The report further shows that cash

receipts received by the county accountant from the Department of Social Services on 1 August were $1,792.24.

State's witness, Sue Modlin, testified:

"Mrs. Agnew gave me $900.00 in cash. I think that was the beginning of August.

I don't remember whether she gave it to me while the Gutfeld audit was underway. I don't remember dates and times. We have been investigated by everybody under the sun and who came when I don't remember.

About the $900.00, I have previously said that the PA-12 receipt refund forms had been typed up, and on this form it indicates the clients's name who is making the refund; the amount to be repaid; the program for which the refund is made and the account number, program number; identifying informaticn for our department and for the State Office. These had been prepared and were being held because I had not been able to get with Mrs. Agnew to get the right amounts of money to put with the forms because of the other activities going on within the department.

We had the forms and Mrs. Agnew had $900.00.

I don't know where the $900.00 came from. It was refunds that had been made.

This is what Mrs. Agnew said, refunds that she had paid back, advances that she had paid back.

She said it was advances that she had paid back.

She didn't tell me anything about this $900.00 in advances that she had paid back.

The $900.00 was used to transmit those refunds to Mr. Hodges.

* * *

I am aware of a State policy having to do with the length of time allowed for the repayment of advances that have been received from time to time by various employees of this agency and other similar agencies.

Q. What is that period of time for repayment?

A. Within the fiscal year."

State's exhibit 15 shows 12 advances to and repayment thereof by Mrs. Agnew numbered by check with initialed approval by the chairman of the Board of Social Services. Mr. Gutfeld testified:

> ". . .[S]he [Mrs. Agnew] stated that she had a card where she listed the advances and repayments, that advances that were made to her and the repayments that were made by her. She exhibit Number 15 which you are showing me is the card Mrs. Agnew showed me."

The total of these advances is $1,314.00. State's exhibit 3, a check book, shows by its stubs the advances having been made on 12 July 1974, 10 August 1974, October 10, 1974, October 10, 1974, October 16, 1974, November 30, 1974, November 30, 1974, December 3, 1974, December 20, 1974, February 22, 1975, February 27, 1975, and February 25, 1975. On the stubs we find in red ink a notation that cash for each advance had been refunded to Modlin.

The State has presented evidence which tends to show that Mrs. Agnew received advances from the revolving account in the amount of $1,314.64 over a period of less than one year. On 28 February 1975, she was paid $588.78 for travel expenses for the months of October and November 1974. She gave Sue Modlin $900.00 in cash on 20 July 1975 which was turned over to the county accountant. She had in her possession in the Department of Social Services the further sum of $414.64 on 15 August 1975. On 29 September 1975 $414.64 was deposited in the revolving account. Further, the controversial item of $180.75 was totally accounted for by the testimony of Mr. Gray. The

only conclusion that can be deduced is that Mrs. Agnew was in charge of the revolving account. She had advanced to herself funds to defray travel expenses in the sum of $1,314.64 and paid over to the county accountant $900 and redeposited $414.64. The $900.00 was turned over to the county accountant on 20 July 1975. The Gutfeld audit commenced 7 August 1975 and ended 18 August 1975. The deposit in the revolving account was on 29 September 1975. The audit by Mr. Green commenced in December 1975. It was customary for Social Service employees to obtain advances from the revolving account to defray traveling expenses until they could be reimbursed by the county. The questioned funds were in the possession of the defendant.

Embezzlement has been defined as:

> "'[T]he fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner.' The mere act of converting or appropriating property to one's own use is not sufficient to constitute the offense. In order to convict, the State must not only offer evidence of appropriation, but it must go farther and offer evidence that such act was done with a fraudulent purpose or corrupt intent." State v. Cohoon, 206 N.C. 338, 174 S.E. 91, 93 (1934).

The only evidence which would give rise to an inference of a conversion or appropriating was the failure of the defendant to deposit the $900.00 in the bank and the deposit of the $414.64 after the audit began. It will be remembered that the $414.64 was on hand on 15 August 1975 and counted by Mr. Gutfeld. We are not aware of any legal requirement that trust funds must be deposited in a bank although good judgment would so dictate. Conceding arguendo there was an appropriation or conversion, we fail to find evidence that such act was done with a fraudulent purpose or corrupt intent. The act of conversion does not raise the presumption of a felonious intent in a prosecution of an indictment for embezzlement. State v. Cohoon, supra.

Evidence of fraudulent or corrupt intent is lacking in the case at bar. There is no evidence that defendant used the funds for her benefit. The revolving account consisted of both funds on deposit and cash on hand. From the funds on hand, payment was made to the county accountant in the sum of $900.00. From cash on hand, the sum of $414.64 was deposited in the revolving account. There is no evidence as to when the advanced funds were replaced in the "cash" account. The evidence shows that $900.00 was on hand on 20 July 1975. The control card, (State's exhibit 15), shows the various amounts advanced were repaid and approved by the chairman of the Board of Social Services. There is no evidence that the funds were not turned over to the county accountant at a time when obligated to do so. Cash

in the sum of $414.64 was on hand on 15 August 1975 and deposited 29 September 1975.

Thus, the State has proved that advancements were made to employees of the Social Services Department from the revolving account for travel; that defendant was custodian of the funds on deposit and cash on hand; that advancements were repaid and held as cash on hand or on deposit; that records of cash transactions were evidenced by control cards; and that funds were repaid within a year and turned over to the county when obligated to do so.

The law does not build the crime of embezzlement upon such proof, and the motion for nonsuit at the close of all the evidence should have been allowed.

CHARGE OF EMBEZZLEMENT OF FUNDS - G.S. 14-92

The indictment charges that defendant willfully and corruptly used and misapplied $1,128.94 for purposes other than that for which it was held. The State, in its brief, argues that expenditures for a punch bowl, a coffee pot, a refrigerator, cakes, pies, gifts for Board members, and an advance to Sue Modlin for vacation expenses and rent could not be considered a proper use of county funds.

In State v. Shipman, 202 N.C. 518, 540, 163 S.E. 657, 669 (1932), the Court defined wilful, corruption, and bad faith as used in the statute, as follows:

"[W]ilful is defined: 'Proceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious. . . . In common parliance, "wilful" is used in the sense of "intentional," as distinguished from "accidental" or "involuntary." But language of a statute affixing a punishment to acts done wilfully may be restricted to such acts done with an unlawful intent.'" (Citations omitted.)

"'Corruption,' (citation omitted); 'Illegality; a vicious and fraudulent intention to evade the prohibitions of the law. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.' The word 'corruptly' when used in a statute generally imports a wrongful design to acquire some pecuniary or other advantage." (Citations omitted.)

"'Bad Faith,' (citation omitted): 'The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect

> or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.' Bad faith and fraud are synonymous." (Citation omitted.)

Furthermore, the defendant must have a felonious intent. Unless the intent is proved, the offense is not proved. State v. Lancaster, 202 N.C. 204, 162 S.E. 367 (1932).

Over defendant's objection, the court allowed the introduction into evidence of State's exhibit 4-c which was entitled "Beaufort County Social Services Schedule of Unauthorized Expenditures Wachovia Bank and Trust Acount 7-099-050." It concludes with the statement: "Total Unauthorized Expenditures $1,128,94." This exhibit lists 54 items bearing "date," "payee," "check number," "for," and "amount." The dated extended from March 16, 1971, to April 1, 1975. Mr. Green testified: "I talked to her [Mrs. Agnew] about State's exhibit 4-C. . . . Her response to these items were items that were paid with the Blind money." State's witness Grady R. Galloway testified:

> "The item attached to that memorandum is a check in the amount of $620.00.
>
> * * *

> The check was endorsed by the Director of Social Services, Betty Agnew.
>
> * * *
>
> Any expenditures from this particular fund made by Mrs. Agnew would be left to her discretion. . . if it would enhance the program for the blind.
>
> * * *
>
> We did not find any irregularities in the administration of the program by Mrs. Agnew here in Beaufort County."

State's exhibit 1 is a memorandum from Mr. Galloway and attached thereto is a check from the Commission for the Blind payable to Beaufort County Welfare Director in the sum of $620.00. This is the fund mentioned by Mr. Galloway that was to be used by Mrs. Agnew in her discretion. State's exhibit 20 is entitled "Beaufort County Social Services Department - Undisbursed Bank Deposits - Wachovia Bank & Trust Company Account Number 7-099-050." The first item on exhibit 20 is a deposit from the North Carolina Blind Commission dated April 6, 1971 and was explained as "Federal Earned Administration Fund" and the amount was $360.87. The funds on exhibit 20 totaled $1,266.72 and were from various sources extending from 1971 to June 8, 1975.

We think the State has not only failed to identify the funds expended as those of the county, but has failed to offer proof sufficient to be submitted to the jury that defendant willfully and corruptly misapplied county funds.

After a thorough study and analysis of the evidence, we can see no crime and no competent proof of any crime described in the bill of indictment.

Defendant's motions to dismiss each case at the conclusion of all the evidence should have been allowed.

Reversed.

Judges BRITT and PARKER concur.

Supreme Court, U. S.
FILED
SEP 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1732

BETTY AGNEW,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ANSWER OF RESPONDENT STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

RUFUS L. EDMISTEN
Attorney General of North Carolina

WILLIAM F. O'CONNELL
Special Deputy Attorney General

Counsel for the State of North Carolina, Respondent

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-4618

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OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported in 294 N.C. 382, 241 S.E. 2d 684. The full text of the opinion appears in the Appendix to Petition beginning at page A-1.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. By *allegedly* using the "scintilla of evidence" standard in determining sufficiency of the evidence to be submitted to the jury, did the Supreme Court of North Carolina deprive petitioner of her due process right to be acquitted unless proven guilty beyond a reasonable doubt?

2. Did the Trial Court's limitation of cross-examination of a prosecution witness deprive petitioner of her due process right to confrontation?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV — Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

With the exceptions hereinafter set forth, respondent accepts and adopts the Statement of Case set forth in the Petition. Respondent's exceptions are as follows:

1. In the first full paragraph of page 4 of the Petition, petitioner, referring to the conclusion by the Supreme Court of North Carolina, that the evidence was sufficient to be submitted to the jury on two of the three charges against the petitioner, states, "In so doing, the majority relied on the 'scintilla of evidence' standard...." Respondent excepts to this statement as being incorrect and argumentative for the reasons set forth in its argument as to why the petition should be denied.

2. The first full sentence on page 5 of the Petition states that "Petitioner was seeking to show that among this witness' clients was the newspaper published by petitioner's chief critic and political foe." This self-serving statement as to what petitioner was seeking to show is not supported by the record and respondent excepts thereto.

The respondent would add the following to the Statement of the Case:

The Trial Court imposed a one-year sentence of imprisonment upon each of the three counts, to run concurrently. The execution of each sentence was suspended upon condition that the petitioner violate no laws for a period of two years and that she pay costs and pay fines as follows: false pretenses—$2,000; embezzlement—$2,000; and misapplication of public funds—$1,000.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE OPINION OF THE SUPREME COURT OF NORTH CAROLINA IN AFFIRMING THE TRIAL COURT'S DENIAL, AS TO TWO COUNTS, OF PETITIONER'S MOTION FOR JUDGMENT AS OF NONSUIT IS WITHOUT ERROR AND VIOLATES NO CONSTITUTIONAL RIGHT OF THE PETITIONER.

It should first be noted that, in spite of repeated statements by the petitioner to the effect that the North Carolina Supreme Court used a "scintilla of evidence rule" or "scintilla of evidence standard" the language of the Court which petitioner complains of is as follows:

> "Nonetheless, if *more than a scintilla of evidence* is presented to support the indictment, the case must be submitted to the jury." (Emphasis supplied) (Appendix to Petition p. A-5)

Further, this language does not state the full or ultimate inquiry which is required by the law of North Carolina and which applied here by the North Carolina Supreme Court in passing upon the sufficiency of the evidence to be submitted to the jury.

> "In passing upon the sufficiency of the evidence, the ultimate inquiry is whether it is such as might reasonably satisfy an impartial mind of the truth of the proposition sought to be proved." Stansbury, *North Carolina Evidence* (Brandis Revision) § 210 pp. 152, 153, citing *State* v. *Satterfield,* 121 N.C. 558, 28 S.E. 491 (1897) and *Moore* v. *R. R.,* 173 N.C. 311, 92 S.E. 1 (1917).

In its Opinion here, the North Carolina Supreme Court applied this "ultimate inquiry" in terms of what the jury reasonably could have found or inferred in its consideration of the sufficiency of the evidence to be submitted to the jury on both of the charges in which it affirmed the conviction. (Appendix to Petition pp. A—11 and A—14). This test having been applied, it is submitted that other words used in the majority and the dissenting opinions, to wit: "more than a scintilla of evidence" and "substantial evidence" become of secondary importance if not irrelevant. To a large extent, it is a distinction without a difference. It appears that the North Carolina appellate courts have never overruled the use of the phrase "more than a scintilla of evidence" although the term "substantial evidence" has more commonly been used in the more recent cases.

Petitioner's argument upon this point appears to confuse two entirely different rules. These are the rule to the effect that it is a violation of due process to convict a person without evidence of his guilt and the rule pertaining to the sufficiency of the evidence to support a conviction. When the former rule is applied, the inquiry does not turn upon the sufficiency of the evidence to support a conviction, but whether the conviction rests on any evidence which would support a finding that the petitioner committed the crime. *Garner* v. *Louisiana,* 368 U.S. 157, 82 S.Ct. 248, 7 L. Ed. 2d 207 (1961).

The Petition contains no mention of any element of either of the offenses in which the petitioner's conviction was affirmed by the North Carolina Supreme Court for which there was not some evidence. A reading of the Opinion of the North Carolina Supreme Court will show that there was such evidence.

This Court has held that it will not substitute its judgment for that of the state court's when it becomes necessary to analyze the evidence for the purpose of determining whether it supported the findings of the state court. *Garner* v. *Louisiana, supra.*

Petitioner cites the case of *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L.Ed. 2d 508 (1975), for the proposition that a rule of law placing the burden of proof on the defendant as to a fact necessary to constitute the crime charged deprived the defendant of due process. The respondent submits that this proposition cannot be related to the petitioner's challenge of the test applied by the state Supreme Court in passing upon the sufficiency of the evidence to be submitted to the jury. *Mullaney* does not prohibit the use of presumptions or permissible inferences. The instructions of the Trial Court to the jury concerning the burden of proof is not here in question. State courts have the final authority to interpret and, where they see fit, to reinterpret the laws of their state. *Garner* v. *Louisiana, supra.*

In summation, respondent respectfully submits that the North Carolina Supreme Court did not commit error under the law of the State of North Carolina in testing the sufficiency of the evidence to be submitted by the jury; that the petitioner was not convicted without evidence of her guilt; that neither the "proof beyond a reasonable doubt" rule nor the *Mullaney* proposition are applicable here; and assuming, arguendo, that it may have been preferable for the North Carolina Supreme Court to speak in terms of "substantial evidence" rather than "more than a scintilla of evidence", the petitioner has shown no violation of her due process rights by the Court's use of the latter term.

II. THE ACTIONS OF THE TRIAL COURT IN ERRONEOUSLY RULING UPON TWO QUESTIONS PROPOUNDED ON CROSS-EXAMINATION TO A STATE'S WITNESS UNDER A MISAPPREHENSION THAT THEY DEALT WITH COMMUNICATIONS WHICH WERE PRIVILEGED UNDER LAW DOES NOT CONSTITUTE A VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS OF CONFRONTATION AND CROSS-EXAMINATION.

The questions upon which the Trial Court erroneously ruled, sustaining the State's objections, deal with whether the witness' accounting firm does accounting work for a certain newspaper and whether he was an officer of the newspaper corporation. (Appendix to Petition pp. A-16, A-17). Cousel for the petitioner apparently acquiesced in the Court's ruling that the law of privileged communication was applicable. After the Court sustained the prosecutor's objection to the question of whether the witness was an officer of the Washington Daily News Corporation, Mr. Wilkinson stated, "I want that in the record unless he claims privilege on that." When the witness indicated he did claim privilege, Mr. Wilkinson responded, "That is a matter of public record. No further questions." (Record p. 41). The North Carolina Supreme Court in holding that this was not prejudicial error notes that the Trial Court did not prohibit this entire line of questioning and that the petitioner's counsel failed to pursue it further. (Appendix to Petition p. A-17). It may be further noted that petitioner's counsel made no effort to introduce any public record into evidence, and, that during the course of a lengthy trial, no effort was made to correct the Trial Court's misapprehension of the law as to privileged communications.

Petitioner contends that the North Carolina Supreme Court did not apply the proper test in determining whether the Trial Court's error is prejudicial, contending that "...the absence of harm to the petitioner should have been established beyond reasonable doubt", relying upon *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1967). That case pertains solely to errors involving denial of a federal constitutional right which was obviously not involved here.

> "The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law." *Chapman* v. *California, supra.*

Further, it is of importance to note that the Petition does not show that any constitutional question was raised in the State Courts with respect to either question raised here by the petitioner. To the best of the knowledge of the undersigned no such question was raised as an assignment of error in the Record on Appeal or in either of petitioner's briefs in the Court of Appeals and Supreme Court of this State.

CONCLUSION

For the reasons stated above, the respondent respectfully prays that this Court deny the petition.

This the 6th day of September, 1978.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General of North Carolina

/s/ _____
WILLIAM F. O'CONNELL
Special Deputy Attorney General

Counsel for the State of North Carolina, Respondent

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-4618

CERTIFICATE OF SERVICE

I hereby certify that I am Special Deputy Attorney General for the State of North Carolina; that I have served copies of the within ANSWER OF RESPONDENT STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA by depositing copies of same in the United States Mail at Washington, D.C., first class postage paid, addressed to:

Mr. Robinson O. Everett
Everett, Everett, Creech & Craven
301 First Union National Bank Building
Durham, North Carolina 27701

This 6th day of September 1978.

/s/ _____
WILLIAM F. O'CONNELL
Special Deputy Attorney General

COUNSEL FOR THE STATE OF NORTH CAROLINA, RESPONDENT